



## Explaining the legal concept of “Vicarious Liability” for the school in relation to pupil use of the internet.

In this white paper, noted legal expert Dr. Brian Bandey discusses the legal concept of “Vicarious Liability”. This Doctrine of Law is vitally important to understand – since it controls, for example, how a School becomes legally liable when its pupils are bullied using the school’s ICT or how a school can become liable for copyright infringement through pupil use of the internet. Dr. Bandey explains these complex issues by using examples of Employment Law with which most headteachers and governing bodies will be familiar. His explanations are understandable and his conclusions compelling.

### 1. INTRODUCTION

Is the School Legally Liable for when one Pupil Cyberbullies another? In this White Paper I am seeking to briefly explain the Legal Concept of “Vicarious Liability” in order to show how the School, in Law, can become liable when its Pupils are Cyberbullied using the School’s ICT.

Schools are densely populated with Employees and Headteachers nowadays have to be more than au fait with the Principles of Employment Law. Accordingly, I have chosen Employment Law based examples to give the Schools an entrée into the Vicarious Liability issues surrounding the Pupil’s use of the School’s Information Communication Technology (“ICT”).

In addition, In order to introduce how this technical and challenging Doctrine of Law operates, I am going to introduce and analyse a “Worked Example” entirely based on Real Life Events. In other words – all that I described happened somewhere, at sometime, to someone (but across a series of unrelated incidents).

The Worked Example is based on the fact that, no matter what we would all like (or prefer) to think; employees fail to meet the minimum standards of competency required of them.

Vicarious Liability is the no-fault liability where the **Blameless Employer** is **liable** in law for the acts of the **Blameworthy Employee**.

We **know** ICT is an instrument used to bully and harass in the School.

What other alternative is available to technologically interdict the behaviour which uses School ICT as its vector?

### 2. UNDERSTANDING THE EMPLOYER’S LIABILITY FOR THE ACTS AND OMISSIONS OF ITS EMPLOYEES MEANS UNDERSTANDING HOW THE SCHOOL BECOMES LIABLE FOR E-BULLYING

In broad legal terms, employers are responsible for the actions and omissions of their employees in the course of their employment. This is known as the Doctrine of Vicarious Liability. In this context, Pupils are not Employees – but they are directly affected by the decisions, actions and failings of the Employees that populate the School teaching, administrative and IT structures.

It follows that any misdeeds committed by workers in the course of their employment can lead to legal claims being successfully taken against the employer by the injured party. This area of this Briefing Paper will explore three possible areas of legal liability that could arise in relation to the employers vicarious liability for its Student’s misuse of E-Mail or Internet Access at school - bullying statements made in E-Mails and infringement of copyright.

The doctrine of vicarious liability has evolved as part of the common law as a result of court decisions over many years. Under the principles of vicarious liability, any party that suffers a civil wrong as a result of an individual’s transgressions or negligence during the course of their employment may sue that individual’s employer and seek damages. In theory the employer could then sue the negligent employee, although this rarely happens in practice.

Who the Employer is varies with the type of school. The Employer is:

- (i) the LA in community schools, special schools, voluntary controlled schools, maintained nursery schools and Pupil referral units
- (ii) the governing body in foundation schools, foundation special schools and voluntary aided schools.

Determining whether an employee's actions or omissions have occurred "in the course of employment" has caused difficulties of interpretation for Courts and Tribunals over the years. Broadly, whenever there is a close connection between the employee's actions and the nature of the employee's job duties, the employer may be held liable. It follows that as a matter of Law, where the employer has provided the Pupil with a computer and with access to E-Mail, they will be liable for any uncontrolled abuse of the computer system perpetrated by that Pupil. By 'uncontrolled abuse' – I mean that reasonable procedures or systems have not been put into place to decrease the likelihood of misuse in an education tool (Internet access, e-mail etc.) which are known to be ripe for Pupil abuse. Such systems may include technological responses such as Active Supervision Technologies<sup>1</sup>.

*1: In this White Paper, the term "Active Supervision Technologies" means Computer software technology which: (i) reads or views Internet based traffic; or (ii) reads or views the content of computer display peripherals (whether the computer is offline or online); and, if such traffic or content meets certain criteria: (a) prevents the intended recipient's access to it; or (b) prevents the display of the content; or (c) automatically generates alerts or reports in respect of such traffic or content.*

### 3. A LANDMARK CASE IN THE LAW OF HARASSMENT

In a landmark case in 2006 by the House of Lords<sup>2</sup> (the highest Court of Appeal in the United Kingdom) on the subject of bullying in the workplace; the law changed so as to make employers liable for workplace harassment even if they were not in any way negligent.

The decision was based on anti-stalking legislation which was used by an NHS employee (a Mr. Majrowski) to hold his employer responsible for a superior's treatment of him. The law in question is 1997's Protection from Harassment Act. The Act does not define harassment, which has enabled courts to permit it to mean tabloid newspaper campaigns and the behaviour of animal rights activists. The House of Lords decided that the Act covers the behaviour of employees at work even when the employer has not caused or failed to prevent the offending behaviour. Those employers now have vicarious liability for the acts of employees. Previously employees had to prove that the employer was negligent in not stopping bullying taking place and that it had caused them psychological damage. The new ruling means that companies can be sued even if the company cannot be expected to have known about the bullying.

There can be no doubt that this decision has serious implications for employers as it gives employees who are bullied or harassed at work a further basis on which to claim compensation from their employers. Moreover, some of the existing limitations and defences will not be available. For example, an employer has a defence under existing discrimination legislation if it can show that it took all reasonably practicable steps to prevent discriminatory harassment occurring – this defence was recently made out where an employer had implemented an effective harassment policy. This would not help an employer facing a claim that it was vicariously liable for an employee's harassment under the Act.

*2: Majrowski v. Guy's and St. Thomas' NHS Trust [2006] UKHL 34.*

#### 4. THE WORKED EXAMPLE

So let us now hypothesise and extrapolate a known set of facts into a School-centric scenario in the form of a mock examination question for a Law Undergraduate. The facts I am going to use are based on a series of real-life cases from which I have selected relevant components.

In this way we can see how the unwary and, indeed, the unmindful school can suffer serious and immediate financial and reputational loss.

**Q**

XYZ School in the UK teaches children from the ages of 12 to 18. Although computerised and offering every Pupil and Teacher Internet Access and a school E-Mail address (indeed – encouraging Pupil – Teacher communication through the School's ICT); the Board of Governors and the head teacher have not implemented any Active Supervision Technology.

They have not done so on the grounds that:

- (a) there was no legal obligation on the school to implement the technology;
- (b) there was no regulatory obligation on the school to implement the technology;
- (c) the technology did not offer a return on investment;
- (d) and that, although the school could afford the technology, the school were told by an IT Consultant they had employed once that it was not lawful to monitor or intercept staff e-mail traffic <sup>3</sup>.

Janet is a 15 year old student at XYZ School. She is undisciplined, egocentric, disrespectful with a considerable sense of self-entitlement.

Mr. Smith is a Trainee Teacher on placement at XYZ School. He is intellectual, timid and apt to make thoughtless comments about his personal life in class which Pupils often deride – both in class and on social networks.

Mr. Smith and Janet do not get on at all. Janet has organised a form of campaign against Mr. Smith on social networking sites, and using e-mails (with lewd attachments) in order to humiliate him.

Learning of this and being unable to address it in the class and fearful to report it to his superiors – Mr. Smith sends Janet a series of harassing and threatening e-mails (which always included profanity and sexualised language). On occasions, Mr. Smith uses the School's ICT employing proxy servers in order to mask his activities.

Notwithstanding her bravado – Janet is a vulnerable child and suffers a form of nervous breakdown as a consequence of Mr. Smith's campaign. She has to take time off school on medical advice. She requires counselling and psychiatric assistance. The truth of the matter is discovered and Parents threaten suit for nervous distress, cost of psychiatric care, lost earnings, out-of-pocket expenses and so on.

*3: For the avoidance of doubt, the advice given to the School on 'monitoring' was incorrect. It is only introduced here as an example of how School's often avoid Active Supervision Technologies without properly understanding the legal context in which they can be lawfully employed. It is not relevant to the answering of the questions posed.*

**(Q1)** **Is it possible for:** the parents of Janet to report the matter to the Police as an offence has been committed under the Protection from Harassment Act 1997?

**A** To question (1) – YES.

**(Q2)** **Is it possible for:** the parents of Janet to have a right to sue the School (on their child's behalf) for the School's Employee's Actions (a Protection from Harassment Act Action founded in the Doctrine of Vicarious Liability)?

**A** To question (2) – YES.

**(Q3)** **Is it possible for:** the parents of the 'Janet to have a right to sue the School (on their own behalf) for their personal loss and damage (including costs, expenses, upset, distress and loss of earnings as they attend to their child's needs to the detriment of their employment or careers) - (an Action founded in the Doctrine of Vicarious Liability)?

**A** To question (3) – YES.


**(Q4)** **Is it possible for:** the parents of Janet to have a right to sue the School (on their child's behalf) for Janet's personal loss and damage (including costs, expenses, upset, distress and cost of medical care) in relation to the School's failure to put in place Active Supervision Technology which would have interdicted Mr. Smith's e-mails - (a Negligence Action founded in the Doctrine of Vicarious Liability)?

**A** To question (4) – YES.

## 5. The School's Liability for Infringement of Copyright

Whenever Pupils have access to E-Mail and in particular, the Internet, a risk will arise that the Pupil will infringe a third party's Copyright whether deliberately or unintentionally. Activities that could give rise to a infringement of copyright include (for example):

- (i) Unauthorised use of material that has been downloaded from the Internet;
- (ii) Downloading music and video files;
- (iii) Copying a document or computer program downloaded from the Internet for another Pupil's use;
- (iv) The display of a third party screen-saver in a classroom;
- (v) Forwarding copyright material (documents, pictures, photographs, drawings, music, sound recordings, films) to fellows Pupils or children outside the School as an E-Mail attachment;
- (vi) Transferring copyright-protected material from one computer to another (for example a Pupil may load copyrighted material that they have obtained elsewhere on to their School computer);
- (vii) The use of pirated software at School.



As in other areas of law, Schools, Governing Bodies and Local Authorities can be held vicariously liable for infringement of copyright on account of the transgressions of one of their Pupils

The Copyright, Designs and Patents Act 1988 states that material can be copied only with the permission of its owner. Copyright automatically accrues to the author of the material without the need for it to be registered. Copyright then lasts for the lifetime of the owner plus 70 years without any requirement for renewal.

The Copyright, Designs and Patents Act applies to material communicated by E-Mail in the same way as it applies to printed material. It protects the owner of material published on the Internet, including documents, web-pages, graphics, screen-savers, computer games, video, sound files and software. Thus, a Pupil who transmits such material as an E-Mail attachment may be infringing the copyright of the owner which is not only a civil wrong but a criminal offence.

The fact that material is readily available on the Internet, or has been published in a book or newspaper, does not prevent it from being a copyright work and protected. Thus, even though material may be freely available on the Internet to read or download, this does not necessarily mean that it can be copied or distributed to others, unless permission from the owner is first obtained.

As in other areas of law, Schools, Governing Bodies and Local Authorities can be held vicariously liable for infringement of copyright on account of the transgressions of one of their Pupils in the course of their education. It will not be a defence against liability to argue ignorance of the infringement. The School, Governing Body and Local Authority (depending on who is the "Employer" with respect to the School involved) is the party that is responsible for taking preventative measures to ensure that none of their Pupils commit an infringement in the course of their access to School ICT.



## 6. CONCLUSIONS

Vicarious Liability is the no-fault liability where the Blameless Employer is liable in law for the acts of the Blameworthy Employee.

We know ICT is an instrument used to bully, threaten and harass in the School.

Mr. Majrowski's experiences at work<sup>4</sup> were not so different from playground bullying or (now in the 21st Century) – Cyberbullying. Majrowski worked for Guy's and St Thomas' NHS Trust in London and claimed that his superior, Sandra Freeman, was rude and abusive to him in front of colleagues. Majrowski, who is gay, claimed that the abuse was fuelled by homophobia.

Under this new interpretation of the law; it will be necessary to show that an offence under the Act has been committed – this involves showing a course of conduct, defined as conduct on at least two occasions, by a Pupil or a Teacher amounting to harassment, so a single act will not be sufficient. It is also necessary to show a sufficient connection between the harassment and the School if the School is to be vicariously liable. This 'connection' arises – as in the worked example – through such factors as the School's ICT being used, the supervision of the parties involved, the proximity of the harassment to the School's normal functions; and so on.

However this is widely construed and any bullying or harassment taking place at School will almost certainly be covered. Essentially then, when one Pupil bullies and harasses another, or when a Teacher bullies a Pupil (within the meaning of Protection of Harassment Act 1997) persistently through e-mail in the School, then the Employer will become automatically liable for the damage caused by the Bullying Pupil (including anxiety, nervous shock, psychiatric and psychological problems, future loss of earnings and so on.) The bullied and harassed Children's Parents will sue the School, NOT the bully or its parents.

*4: See the case discussed in Paragraph 3. above "A Landmark Case in the Law of Harassment".*

## Copyright Information

© 2011. Dr. Brian Bandey. All Rights Reserved.

No part of this document may be reproduced in any form by any means, nor may it be distributed without the permission of Smoothwall, nor may it be resold or distributed by any entity other than Smoothwall, without the prior written authorisation of Smoothwall.

Smoothwall does not provide legal advice. Nothing in this document constitutes legal advice, nor shall this document or any software product or other offering made reference to herein serve as a substitute for the reader's compliance with any Laws (including but not limited to any act, statute, regulation, rule, directive, administrative order and/or executive order) made reference to in this document. If necessary, the reader should consult with competent legal counsel regarding any Laws made reference to herein. Smoothwall makes no representation or warranty regarding the completeness or accuracy of the information contained in this document.

THIS DOCUMENT IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND. ALL EXPRESS OR IMPLIED REPRESENTATIONS, CONDITIONS AND WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE DISCLAIMED.

"Smoothwall" refers individually and collectively to all of the companies in the Smoothwall Group of Companies throughout the world including, but not limited to, Smoothwall Limited and Smoothwall Inc.